TOWN OF PALM BEACH

Office of The Town Clerk

SPECIAL TOWN COUNCIL MEETING HELD ON TUESDAY, DECEMBER 23, 2003

I. CALL TO ORDER AND ROLL CALL

The meeting was called to order at 9:30 a.m. in the Town Council chambers by President William J. Brooks.

President Brooks announced the Special Town Council meeting was a public hearing related to Maureen Donnell and Fern Tailer deNarvaez, plaintiffs, v. the Town of Palm Beach and others as defendants, and a mandatory injunction issued by Daniel T. K. Hurley, United States District Judge, United States District Court, Southern District of Florida, directing the Town to respond to plaintiffs' request for permission to display a nativity scene on public property.

The following Elected Officials were found to be present on roll call: President Lesly S. Smith; President William J. Brooks; President Pro-Tem Norman P. Goldblum; Councilman Samuel C. McLendon; Councilman Jack McDonald; and Councilman Allen S. Wyett. Also attending the meeting were: Assistant Town Manager Thomas G. Bradford; Town Attorney John C. Randolph; Police Chief Michael Reiter; Director of Public Works Albert P. Dusey; Risk Manager Karen Temme; and Town Clerk Mary A. Pollitt.

II. INVOCATION AND PLEDGE OF ALLEGIANCE

The invocation was given by Town Clerk Pollitt. President Brooks led the pledge of allegiance.

III. APPROVAL OF AGENDA

Councilman McLendon made a motion to approve the agenda. The motion was seconded by President Pro Tem Goldblum and carried 5-0 on roll call.

IV. CONSIDERATION OF REQUESTS OF MRS. MAUREEN N. DONNELL AND MRS. FERN TAILER deNARVAEZ

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RECYCLED PAPER

A. Presentations Relating to Request for Permission to Display Nativity Creche

1. Maureen N. Donnell or Representative

2. Fern Tailer deNarvaez or Representative

Robert Critton, Attorney

My name is Robert Critton. I am from the West Palm Beach law firm of Burman, Critton, Luttier & Coleman.

Madam Mayor, President Brooks, Council members, Mr. Randolph, whom I know well, I'm here on behalf of Maureen Donnell and Fern deNarvaez. I've asked to speak, while I represent both Mr. and Mrs. Donnell, I've also been asked to speak on behalf of Fern as well today. I wish you all a Merry Christmas, a Happy Hanukkah, and happy holidays.

We're here as a result of a Federal District Judge having ordered the Town of Palm Beach to consider a simple, common sense request that was made by Miss Tailer back on September 8th of this year and by Mrs. Donnell on October 3rd of this year. And that simple request was – that the Town had displayed in the year 2002, and they assumed in the year 2003, two donated menorahs. They displayed them at two – one public location located at Royal Poinciana, where it stands today, and a second as I understand it on privately owned land but using public resources to both erect the menorah, to maintain it, and to as well take it down at the end of the holiday season. That was done in the year 2002, and it was done, that is the erection of the two menorahs came about as a result of a request Councilman Goldblum made on October 26, 2002, in a memorandum he sent to the Town Manager, Mr. Elwell. And it was a proposed display of donated menorahs which would go at Royal Poinciana and as well at the Esplanade, and they would be close to and near what was described in the Councilman's memorandum as the holiday tree.

There was a discussion and there was a memo and it was sent to all Council members. On October – at the October 8th meeting, this proposal was taken up, not as Miss Tailer's and Mrs. Donnell's request which despite numerous requests was never even placed on the Town's agenda. But on October 8, 2002, what occurred was that there was the discussion by Mr. Elwell. There were motions and there was unanimous approval of the erection and installation and maintenance of the menorahs in conjunction with, as it was described in the memo and in the motion, the holiday tree, the holiday tree – not a Christmas tree but a holiday tree, and there was discussion whether the holiday tree lighting and the menorah candle lighting would occur at the same time. Both Councilman Wyett and Mayor Smith said, 'no, they should occur separately.' But it was unanimously approved. There was no discussion on size, dimension or any other standards that would be applied but it was both a memo, and within two weeks it was on the agenda and unanimously approved.

In this instance, I want to make it very clear on behalf of Miss Tailer and the Donnells is that their request is not that the menorahs, in any way, shape or form be removed. In fact, they applauded the actions that the Council took in 2002 in erecting the menorahs and recognizing their religious

significance. What the Donnells and Miss Tailer want is to recognize, now that the Town has, in putting a religious symbol on public property and supporting a religious symbol, albeit if it is on private property, with taxpayer money at the Esplanade – the Esplanade at the corner of Worth and south County – that equally, fairly, that nativity creches be placed at both locations, and that, as Christians, they be allowed that same equal right to express their religious freedom as anyone else would be with an appropriate display at this time of year.

Mrs. Donnell wrote in her letter of October 3rd a message of inclusion, not exclusion, and certainly not discrimination. Her message was very simple and was expressed in the letter. We need to respect everyone's religion. A simple, straight forward message. That request was fair, was generous, and it was thoughtful. Yet, the Town, even after the October 3rd and the September letter by Fern Tailer, refused to even agenda this item for consideration. Mrs. Donnell contacted me and I in turn wrote to my friend, Mr. Randolph, on October 24th and again on November 24th and asked the Town to please, if it intended to display the menorah again this year, which again we in no way discouraged, encouraged, because of its religious significance at this time of year. We asked them to please place the Donnell request on the agenda–that the Donnells have an equal constitutional right to express their Christian religion at the same time that those of the Jewish faith could express their religious beliefs by the candle lighting of the menorah, and that as long as the Town was including religious symbols in its holiday display that it is well to include the nativity creches.

Again, on both requests, the matter was not agended. It was said that it would be placed and turned over to all Council members and then the Council members, of the five of you, six of you, all one had to do was request it be placed on the agenda, and it would be an agended item and would be placed for consideration, but no one placed that issue or requested that be placed on the agenda. The only way it is on the agenda today is because a U. S. District Judge said , "Place it on the agenda." Neither this town or any other is above the laws of the Constitution of the United States, and that is right. It is as it should be.

So, I am making a request on behalf of Mrs. Donnell today and Ms. Tailer, that same simple, fair request. The same type of presentation that I would have made back in September, October, November, or early December this year, and that request to you today is that Mrs. Donnell, Mr. and Mrs. Donnell, be allowed to place two donated creches, nativity creches, one at the location of Royal Poinciana Way and the second at the location where it is placed with taxpayers money and erected at taxpayers money at the corner of Worth Avenue and County Road.

She has purchased two nativity scenes. One is a life size scene, that I believe and would recommend, that would be appropriate for the Royal Poinciana location. A second, which is approximately 36 to 38 inches high, includes a stable and figures be placed at the Esplanade area. They are of high quality. They are certainly something that the Town would be proud to display as part of its overall, inclusive holiday display. I don't think they are quite as large as the menorahs that are out there, but we think they would be a welcome addition.

The Town's current display, quite frankly, is discriminatory. My Jewish friends have said,

"We don't understand how the Town could not have made a decision to recognize that the menorah is a religious symbol." It is a religious symbol and to the extent that people don't believe that, we, my Jewish friends, were offended. And equally so, they, both of Jewish and Christian faiths, said, "A nativity scene clearly is a religious symbol. A holiday tree is not." Ribbons and balls, without angels, without the star of Bethlehem, without any designation, is just that. It designates a holiday spirit with the spirit of giving. A nativity scene clearly is a religious symbol.

If in fact, the menorahs - or with the menorahs currently being displayed, we would ask that the Town Council would approve Mrs. Donnell's offer, Mrs. Donnell's request, Ms. Tailer's request that these two nativity scenes be placed as I have described them. The eyes of the taxpayers of this Town, of Palm Beach County, of the State of Florida, and as a result of the publicity that this has caused, are on this Council today. They are focused on you. They are focused on the decision that this Council will make, and that decision, that is whether to put your head in the sand, to dig in your heels, is yours. The decision that you can make today is to send a message – a message from Palm Beach, Florida, and the Town of Palm Beach to the County, to the State, to the Nation, to the World is that the Town of Palm Beach is as it should be, and I think my guess is that overwhelmingly all six of you are as tolerant, as inclusive, both as to cultural and religious backgrounds. I would encourage you to approve these, to accept the generous donation, to recognize them exactly what they are for. The choice is yours. I ask that you act responsibility and fairly.

Thank you for your time, Commissioner Brooks.

Brooks:

Mr. Critton, may I ask that you stay at the podium in case the Mayor or any of the Council members should have a question for you.

Mr. Randolph.

Randolph:

Mr. Critton, I have a question, just to clarify the request.

As I understand your request from the previous correspondence and today, it is because the Town has accepted the donation of menorahs from others and the Town has displayed the menorahs that your request is that the Town accept the donation of the nativity scene, and the Town place the nativity scene, with taxpayer dollars, just the same way it has placed the menorahs. Is that correct?

Critton:

Yes, however, we're happy to use privately funded donations in order to have the nativity scenes placed as they are. We think it is an important issue, and I certainly don't–if to the extent that the taxpayers' monies have been used to place the menorah, I think it would be equal, I think if would be fair, I think it would be just, under those circumstances, to use those same taxpayers' funds under the circumstances to the extent that someone would find that offensive, I find that hard to believe, but to the extent that someone would, we will certainly use private funds to both erect and

maintain both nativity scenes.

Randolph:

Has that been your position before today, or has your position up to this point been that you have requested the Town, with the taxpayers dollars, place the nativity scenes next to the menorahs in the same way that it has done with the menorahs?

Critton:

I have no position, Mr. Randolph. I merely made a request that we be allowed to appear, and I think in the normal course of business, had this issue come up on a, I would say, a more reasonable basis, I would have been in a position back in September, October to work out appropriate details with you. Whatever we would think that would be appropriate in conjunction with the Council, we are certainly willing to work with you.

Let me make one other aspect clear. As I am speaking for Miss Tailer and Mrs. Donnell today, based upon the requests that I made, the requests that they made, and the requests specifically that I made to you back in October - November of this year, I am not of counsel, I am not a co-counsel in the pending, current case. Mr. White from the Thomas More law firm in Michigan is here. I'm not here to resolve or not to resolve or to address the issues in that case. I am here to make the request, that same request that I would have made had I been allowed to make the presentation back then. So, to the extent that it has some implication or effect on the law suit, I certainly don't want to speak for Mr. White or the Thomas More Law Firm under those circumstances.

Brooks:
Thank you.

Mr. Critton, is Mr. White going to address legal issues – the existing case law surrounding these matters or are you going to hold on that?

Critton:

I think what we would like to do is hold on that issue. I think our position has been well laid out with Judge Hurley, and I am not so sure that at least on the short notice – we received notice of this meeting yesterday at approximately 1 o'clock, and Mr. White flew down last evening. So, he has certainly less than 24 hours to prepare.

Brooks:

It is my understanding that the Thomas More Foundation has indeed engaged in other matters of this nature, so, obviously he must have some knowledge of the existing case law.

Critton:

These are smart lawyers who have a very all encompassing background with regard to this case law.

Brooks:

Mr. Critton, is a smart lawyer an oxymoron?

Critton:

That's a good point. I shan't answer that, because we both know the answer to that question.

Brooks:

Well, whatever. Mr. White is welcome to speak whenever he wishes.

Critton:

I think we will probably defer, if we may, at this time, President Brooks.

Brooks:

That's fine, sir. Gentlemen, any other questions for Mr. Critton?

Mr. McLendon. Hit your button, Sam, please, so I can catch everyone.

McLendon:

You inferred, if I understood correctly, that the nativity scene proposed for County and Worth might be smaller than the one at Poinciana. Are there differences in sizes and how large are they?

Critton:

The proposed nativity creche and the stable scene for Royal Poinciana is life size. It is a good size nativity scene. The nativity creche and scene for the Worth and County site is approximately 36 inches, 38 inches, high. Because it is a smaller location, we felt that was appropriate. Some smaller display was probably appropriate, Councilman McLendon, and we believe that it is certainly appropriate for that site. In case I didn't mention it, we have those. They are purchased. They are here in Town. They are ready to be installed.

McLendon:

Thank you.

Brooks:

Mayor Smith.

Smith:

Yes. Mr. Critton, can you tell me – I don't understand what the Thomas More Center is and how they became involved with the two ladies. Are they a part of this law suit or a part of your law suit? If you could tell me, who they are, and what their involvement is in this local matter?

Critton:

Well, it's a local/federal matter now. It's now a federal matter, ma'am.

Smith:

Well, I know it's a local/federal matter, but it started out as a local matter.

Critton:

It started out with a local matter with Mrs. Donnell's request and Ms. Tailer's request. It became, I'd say, a lawyer matter when I made the request, and it became a much more public matter when the Thomas More law firm – they are a Michigan based law firm, they are a public interest firm. I don't certainly propose to speak for them today.

Smith:

But how did they find out about it? Did you contact them or did they contact you?

Critton:

I certainly did not contact them, and ...

Smith:

Did Mrs. Donnell and Mrs. deNarvaez contact them? We didn't have national publicity before. That's why I was wondering how they got involved.

Critton:

I think to the extent that however they got involved, that would be their attorney/client privilege, just like if I wanted to inquire as to whatever discussions you have had with Mr. Randolph today, I think you would respectfully decline and say, "That's attorney/client privilege."

Smith:

I could tell you I had none. The paper that Mr. Randolph wrote was submitted to the Council and I think to everyone. Everyone saw that, but we didn't have any discussions about it.

Critton:

Right. Let me express it this way: whoever is involved under whatever circumstance, it's the issue that is paramount, not the personalities.

Smith:

Oh, I understand the issue, but I was just wondering who the personalities were.

Critton:

I can tell you that the Thomas More Law Firm is a public interest law firm out of Michigan, and I'll let them speak for themselves to the extent that, in any way, shape, or form, form the issue or decide the issue in this case which I think it should not, respectfully.

Smith:

Thank you.

Critton:

Thank you, ma'am.

Brooks:

Are there any other questions or observations for Mr. Critton on behalf of the plaintiffs? Mr. Wyett.

Wyett:

Mr. Critton, your presentation is very well done, and I just want to go on the record, I have no problem with nativity scenes wherever they may be erected, but you left out something, I believe. The Town did respond and state that nativity scenes would be very welcome to go in Bradley Park where we have designated that as the public forum for all religious and other activities. It was turned down as being insufficient. Yet, it is a very highly visible location. It's adjacent to one of the main thoroughfares entering and leaving the Town, and it is where the religious menorahs, two of them – one by the fact that the court ordered us to put it there – reside each year. The Town thought it was a very appropriate place to have a nativity scene, and I welcome it there.

Critton:

Councilman Wyett, I appreciate your comments, and I am encouraged by your statement of inclusion, but let me comment this way, and I think Richard Thomas may have said it best about the time the law suit was filed – two responses. One is that the religious menorahs in Bradley Park, I dare say then does that mean the menorahs that are on Royal Poinciana and the Esplanade are non-religious menorahs? That is question one.

Number two is, and I understand the people want to try to do that. They say, "Well, maybe it's not the full candle, you know, the full magilla, but I would respectfully suggest to you that a menorah is a menorah, and it stands for a religious symbol. Secondly, Bradley Park, and Mr. Thompson, as he said, "You know, back in the days of the civil rights movement, you could come into a public accommodation, but it was separate, and it certainly was not equal. You can get on the bus, but you have to ride at the back. You can come into my movie theater, but you have to sit over here."

I'm tell you, Miss Tailer and Mrs. Donnell want to fit right here with everyone, and we want our nativity scenes right where the menorahs are. We applaud the menorahs and hopefully, just as you stated, you'll applaud the addition of these nativity scenes to the Town of Palm Beach holiday display.

Brooks:

Mr. Critton, if I could just comment on Mr. Thompson's, in my opinion, ill chosen words about the back of the bus. As Mr. Wyett just pointed out, this is one of two main thoroughfares that come into this Town, and are you, by inference, saying that the religious ceremony that was held there last evening is at the back of the bus? I understand sometimes that the zeal for the Lord can cause us to say emotional statements, but I thought the back of the bus analogy was totally, totally

off base.

Audience booing

Let's have some order. I would like at this time of the year that we would proceed with civility and decorum. There is certainly no need for booing. If you wish to applaud, that is fine. There is – I believe some of you are here today speaking on behalf of the first amendment. Let me say I appreciate your expression of such, but I find the conduct of booing to be vulgar and insensitive.

Thank you very much. Mr. Critton.

Critton:

You and I , President Brooks, probably have a – we respectfully disagree on that particular topic. I think wherever there is a menorah, there should be a nativity scene. Wherever there is a nativity scene, put the menorah up. Let them be inclusive.

Brooks:

Thank you, sir.

Critton:

Thank you.

Brooks:

Anything else for Mr. Critton? Then let me now go to Mr. Randolph.

Critton:

Am I released, sir?

Brooks:

No, you are not released at all. Let me also offer you a chance to come back if you should have questions on what Mr. Randolph is going to annunciate, or if Mr. White would like to – you both have that opportunity.

Critton:

Thank you for your courtesy, sir.

Brooks:

You're more than welcome, sir. Mr. Randolph.

B. Overview of Pertinent Legal Issues by John C. Randolph, Town Attorney

Randolph:

Thank you, Mr. Brooks.

First, I would like to introduce Joanne O'Conner from my office who has assisted in the research in regard to this matter, and who will, along with me, be able to answer any questions that you might have in regard to it.

I've provided the Council with a letter which cites the various case law in regard to this particular issue, and I will briefly take you through that. I think that each of you have had an opportunity to read it. The first thing the letter does is take you through the history of this request from Mrs. Donnell, in which she asks that the Town display a nativity scene and a cross next to the menorahs that the Town has included in its holiday displays. She asks that they become part of the Town's public displays.

In reading the correspondence, I do not think it was unreasonable for the Town to have considered this a request for the Town to accept a donation, and for the Town to erect the nativity scenes next to the menorahs on the same basis that the Town placed the menorahs, i.e. that the Town as a receipt of a donation now owned the menorahs and through the use of public funds, placed the menorahs, one on public property and one on private property. Because, I thought, that was the offer, that the Town erect the nativity scene and not that Mrs. Donnell erect the nativity scene, I responded to Mr. Critton that it is not incumbent upon the Town to erect a nativity scene as part of its holiday display, but in the same letter, I attempted to make it clear to Mr. Critton that Mrs. Donnell has the right to exercise her first amendment rights, her freedom of expression, by displaying the nativity scene as what has become known as a traditional public forum in the Town that is Bradley Park.

The Town does not determine what a traditional public forum is. Court would determine what a traditional public forum is on review, but I believe, on the basis of the knowledge I have, that Bradley Park is the traditional public forum in the Town, and I believe Mary Pollitt, the Clerk, will be able to sustain that opinion. She is the one who entertains Special Permit applications and her testimony will reveal that such applications have been applied for and granted in Bradley Park, but that no such applications either for Special Permits or unattended private displays have ever been granted in the median at Royal Poinciana Way.

As has been indicated here today, by Mr. Critton in his previous letter, and his advice here today, that was not an appropriate place as far as Mrs. Donnell was concerned, even though it is a highly visible location within the Town. The law suit ensued, and in the law suit it was claimed by the plaintiffs or the plaintiffs objected to the Town's policy practice and/or custom regarding the public display of religious symbols which policy it is alleged permits the public display of privately financed Jewish menorahs during the Jewish religious observance of Hanukkah but prohibits the similar display of privately financed Christian nativity scenes during the Christmas season.

No mention is made in the law suit of the request to place the cross on Town property.

Because the Town did not formally act upon the request to accept the donation and for the Town to place the nativity scene on public property, the Judge entered the mandatory injunction stating two things: One that the Town had until noon on December 24th to answer or in the event the Town did not answer, that the request would be considered a denial and the law suit would go on from that point.

Although the Town has considered this request as a request for it to display a nativity scene to date with taxpayers money, I believe on the basis we heard from Mr. Critton today, I think for the first time, and on the basis of the mandatory injunction we received from the Court, that we need to break this issue down into two phases. The first will deal with the establishment clause, and the duties, rights, and obligations of the Town in regard to the display of religious symbols on public property which will be the first item I will discuss, and then, I think because of the request that we have heard here today, we have to divide it into the matter of freedom of expression, i.e. the right of a particular party to express their rights and their expression on public property at their cost.

First, we will speak to the Town's holiday display. I think the most dispositive case in regard to that issue which relates to the establishment clause, that clause being that the government shall not endorse a religion, is the case of Allegheny vs. ACLU of Greater Pittsburgh. In that particular case, there was litigation involving the constitutionality of two recurring religious symbols in Pittsburgh. One being a nativity creche which was displayed on the grand staircase of the Court House. That creche had a banner proclaiming Gloria in Excelsis Deo which means, of course, glory to God in the highest. The second of the displays was 18 foot Hanukkah menorah which was placed next to a 45 foot Christmas tree, and at the foot of that tree was a sign which says, 'During the Holiday Season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom.'

The menorah was owned by a Jewish group but was stored, erected, and removed each year by the City....much the same way as the menorah in the Town is handled. The Court recognized that the establishment clause precluded a government from endorsing any religion or even entangling itself in the support of religion. The Court in reaching its decision relied on a previous case of the Supreme Court called the Lynch Case which involved the City of Pawtucket, Rhode Island, in which a nativity creche had been displayed in Pawtucket, and it was a split decision. It was a 5 - 4 decision. In that case, the City's display not only contained a nativity creche, but – and I am going to read everything that it contained with it –'a Santa Claus house with a live Santa distributing candy, reindeer pulling Santa's sleigh, a live 40 foot Christmas tree strung with lights, statues of carolers in old fashion dress, candy striped poles, a talking wishing well, a large banner proclaiming seasons' greetings, a miniature village containing several houses and a church, and various cut out figures including those of a clown, a dancing elephant, a robot, and a teddy bear.'

Even the dissenters in that case who felt that the creche was still not appropriate because it endorsed religion realized that the endorsement of religion was not allowed by the town, but the majority felt that they had to analyze the display in context, and in analyzing that display in context, they indicated that was not a support of a religion by having a nativity creche, because of the other

holiday symbols that surrounded it.

Brooks:

Mr. Randolph, if I could interrupt for just a minute. I am very familiar with that, and I would like to point out this is known as the plastic reindeer rule. My fellow Catholic, the late William Brennan, Supreme Court Justice, writing for the dissent, said, 'This is nonsense. Furthermore it is offensive nonsense. We are taking a nativity scene - something that is sacred to billions of people and trivializing it with dancing bears and Santa Claus giving out candy canes and other sorts of things that somehow or other, in the convoluted thinking of the majority, equals the neutralization of a sacred symbol.' So, I would just like to throw that in for the record, sir. Thank you.

Please continue.

Randolph:

Having said that, and the Supreme Court having reviewed the Lynch case made the decision that their task in the Allegheny case was to review the context of the particular symbols in the Allegheny case. In doing that, they held that the nativity scene was unconstitutional as a violation of the establishment clause and that the menorah with the Christmas tree was constitutional. They said as follows, 'The necessary result of placing a menorah next to a Christmas tree is to create an overall holiday setting that represents both Christmas and Hanukkah, two holidays, not one. Because government may celebrate Christmas as a secular holiday, it follows that the government may also acknowledge Hanukkah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city's acknowledgment of Hanukkah as an extemporaneous, cultural tradition.

The Court recognized the Christmas tree as a secular symbol while the menorah can be both religious and secular and said as follows: 'Accordingly the relevant question for establishment clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths or rather simply recognizes that both Christmas and Hanukkah are part of the same winter holiday season which has attained a secular status in our society.' Of the two interpretations, the Court went on to state that the latter argument seems the more plausible. It is distinctly implausible to view the combined display of the tree, the sign and the menorah as endorsing the Jewish faith alone. When a city like Pittsburgh places a symbol of Hanukkah next to a symbol of Christmas, the result may be a simultaneous endorsement of Christianity and of Judaism, depending upon the circumstances of the display, but the city's addition of a visual representation of Hanukkah to its pre-existing Christmas display cannot be reasonably understood as an endorsement of Jewish, yet not Christian belief. Thus, unless the combined Christmas/Hanukkah display fairly can be seen as a double endorsement of Christian and Jewish faiths, it must be viewed as celebrating both holidays without endorsing either faith.

The Court went on to note that the menorah – that the tree in that particular case was the predominant symbol. It was a 45 foot tree with an 18 foot menorah and indicated with that configuration, it seemed sensible to interpret the meaning of the menorah in light of the tree. It was

also interesting Justice O'Conner's quote in regard to this display where she said, 'In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not only the traditional way of observing the winter holiday season. Although the city has used a symbol with religious meaning as its representation of Hanukkah, this is not a case in which a city has reasonable alternatives that are less religious in nature. It is difficult – and I am quoting from Justice Sandra Day O'Conner – 'it is difficult to imagine a predominantly secular symbol of Hanukkah that the city could place next to its Christmas tree. An 18 foot dreidle would look out of place and may be interpreted by some as mocking the celebration of Hanukkah.'

The Town, under the Allegheny case, should undertake a similar examination of its current display of the holidays in order to assure itself that the display that it has erected is not in violation of the establishment clause, i.e. that the Town is not endorsing a particular religion – in this case, Judaism, – because of the placement of the menorah. I think that you need to examine the record in regard to the Town's placement of the menorah. The display on Royal Poinciana Way consists of red ribbons festooning the various palm trees that are located on the median. Although I don't know the height of the tree, the tree seems significantly taller than the menorah that has been placed there. It is a fact that the tree had been there for at least 10 years alone without a menorah, and it was not until Mr. Goldblum's memo in 2002 that the Town gave consideration to acknowledging the Hanukkah season as well as the Christmas season, and in the memo of Mr. Goldblum, it is indicated that the intent is to broaden the Town's holiday displays by recognizing both the Christmas holiday and the Hanukkah holiday throughout a five week period, not just through the Hanukkah festival, but through a five week period, they both would be placed there at the same time. They would be lighted at the same time. There would be no religious significance to their lighting. They would be lighted at the beginning of the holiday season and taken down at the end of the holiday season.

The menorah on Worth Avenue is a bit of a different story. That was donated also. It was placed on private property. The difference on Worth Avenue is that the menorah is not next to the Christmas tree, but in that particular case also, it is lighted on the same night as the Christmas tree in a holiday opening. In fact, it involves the Mayor and the Town Council. It think that particular location probably needs to be considered differently than the Royal Poinciana location, not only because of the private property aspect, but because of the distance of the menorah from the Christmas tree.

I think that the Council has concluded, perhaps not publically, but I think they have done this publically when they made their decision in 2002 that the display that they were erecting in 2002 was not a religious display. That it was simply a holiday display to recognize the cultural aspects of the Hanukkah and Christmas season. I see no intent in the record by the Town to indicate that it was intending on a religious display. I think it highly unlikely that the Court would determine that, based upon the record that the menorah is a religious display.

How, then might the Court look at the displays in the event that the Town would add a nativity scene and cross? I think that is the question that is before you today. I think for purposes of this discussion, we should eliminate the cross from the discussion even though that was part of

the request, it was for some reason, not made part of the law suit, and I think the discussions would become somewhat different if we were talking about erecting a cross as well as a nativity scene.

The Court will clearly have to examine the intent of the Town – excuse me, Mr. Brooks?

Brooks:

I think – my intention was to let you go through this and then entertain questions, but Mr. Goldblum's light is on, and I am wondering if you want to wait.....?

Goldblum:

No, I just want to add one thing to what Mr. Randolph said. We had a religious symbol for Hanukkah last night in Bradley Park and that is where the religious symbol comes in – not on the public thoroughfares.

Brooks:

Thank you, Mr. Goldblum. Would you please continue, Mr. Randolph?

Randolph:

I think after considering whether or not your action of putting the menorah on the public and on the private property is constitutional or not, the next issue is what effect would the — how would the courts look at your, i.e. the Town placing a nativity next to the menorahs? I think you have got to look at the Allegheny case. The Court in Allegheny had a footnote which said the display of the menorah next to a creche on government property might prove to be invalid.

There was a case that came out after that called ACLU in Jersey vs. Schindler where the Third Circuit held that the traditional display of a creche, menorah, and a Christmas tree and a sign on the Jersey City Hall Plaza violated the establishment clause. It stated: 'Aside from the Christmas tree, the creche and menorah displays were unaccompanied by any other traditional secular symbols of holiday season. Notably the Jersey City creche and menorah were owned, stored, and maintained by the City and displayed on City property in front of City Hall.' The panel concluded that government endorsement of many different religions violates the establishment clause. That a reasonable observer viewing a holiday display would not be aware of the City's other religious and cultural celebrations at other times of the year, and that the City's policy of celebrating many different religions was a quintessential example of government's entanglement with religion.

The Court went on to say, 'The menorah is a religious symbol and when displayed with a creche, the menorah's religious significance is emphasized. Moreover, the token inclusion of the Christmas tree does little to mitigate the religious message of the creche and the menorah. Thus the display cannot be viewed as anything but a constitutionally impermissible dual endorsement of Christianity and Judaism.' That case went up – it was remanded and in that particular case, the Jersey City modified its traditional display by adding a Kwanza symbol, a sled, figures of Frosty the Snowman, and Santa Claus and two additional signs emphasizing cultural diversity and that was held to be constitutional.

That's the issue as it relates to the establishment clause. I think the Supreme Court in Allegheny was quite clear even though it was a split court, and we don't know what the Court might do with the issue today; however, that is the law as it exists today as I have referenced.

The next issue deals with – if Mrs. Donnell wants to install a nativity scene on her own at these locations that have been suggested. That is an entirely different matter, one that we have not considered in the past other than in my response to Mr. Critton, wherein I stated Mrs. Donnell absolutely has the right to her freedom of expression and to place a nativity scene, and in that particular case, I indicated that the traditional public forum in the Town of Palm Beach was Bradley Park. I don't believe that the record establishes that the median on Royal Poinciana Way is a traditional public forum. I know of no free standing, private displays that have been allowed by the Town at that location nor do I know of any special permits which have been granted to allow special events at that particular location. It is also interesting to note that is a DOT right-of-way over which the State Department of Transportation has jurisdiction.

I think it would be important to hear from Mary Pollitt in regard to the history of that particular location as it relates to granting of either private, unattended displays or of special events such as where people have asked for freedom of expression. If I may ask Mary a couple of questions.

Brooks:

Go right ahead, sir. Mrs. Pollitt, please.

Randolph:

Mary, are you the Town Clerk for the Town of Palm Beach?

Pollitt:

Yes.

Randolph:

And do your duties include entertaining applications for special event permits?

Pollitt:

Yes.

Randolph:

And do your duties also include when somebody comes to ask if they can put up an unattended display somewhere? Would you deal with that?

Pollitt:

Yes, I would.

Randolph:

Have you reviewed the records of the Town to make a determination as to whether or not any unattended displays, other than the holiday displays that have been put up by the Town, have ever been allowed to be constructed on the median at Royal Poinciana Way?

Pollitt:

Yes, I looked into it, and I found no records at that location of any application or inquiry.

Randolph:

How far back did you look?

Pollitt:

I looked back into the 80's approximately 1986.

Randolph:

And you never found that the Town granted the use of that property for private, unattended display or granted the use of the property for any special permits or gatherings?

Pollitt:

No. I found no evidence.

Randolph:

Have you found that Bradley Park has been used for that purpose? Has the Town granted special event permits for Bradley Park?

Pollitt:

Yes. The Town has.

Randolph:

And indeed, has a religious menorah been placed in Bradley Park?

Pollitt:

Yes.

Randolph:

And are religious observances – do religious observances take place at Bradley Park surrounding the menorah?

Pollitt:

Yes, they do.

Randolph:

Thank you. I have no further questions at this time.

Brooks:

Thank you, Mrs. Pollitt. Mr. Randolph, please.

Randolph:

That's the issue of a traditional public forum. As I say, the Town cannot dictate what a traditional public forum is. Traditional public forums contain–include streets and public places, but I believe the case law has indicated that it's reasonable for the Town to make a determination as how the particular area has been used traditionally in its making a determination as to whether it would continue to be used – whether it would be used for purposes other than have traditionally been allowed at that location.

The public forum test is also broken down into a designated public forum, not only a traditional public forum which we have addressed. But whether or not an area has become a designated public forum, I suppose, and that means the Town itself by its actions has designated it as a public forum which would allow persons, under content neutral time, place, and manner restrictions, allow the area to be used as a designated public forum for a specific purpose. I think there is an argument to be made that the Town perhaps by using that particular location for the placement of the Town's holiday display could have designated that as a designated public forum for such displays. I think there is an equally strong argument the area has not been designated by the Town for expressive activity or for unattended displays but only for the Town's public holiday display.

In considering whether or not these two particular areas are areas that –particularly the Royal Poinciana area is going to be used for the private display of the nativity scene – the Town must take into consideration the fact that once it allows the area to be opened for that purpose, that under the traditional public forum aspect, if you consider the traditional public forum, then that will become a traditional public forum in the Town for use by anyone who wants to use that area for expressive activity or for freedom of speech. If you designate it as a public forum, it could be a more limited public forum, but it could also be used by others who wish to use it for expressive activity such as holiday displays from time to time during other parts of the year.

So, those are the things that you have to consider. You first have to consider the establishment clause and whether or not you feel it is appropriate for the Town to put up the nativity scene, and whether or not, your symbols that now exist are appropriate, and secondly, whether or not you wish to allow Mrs. Donnell to privately display her nativity scene with the appropriate disclaimer – you would have to have a disclaimer saying that the Town does not endorse this – at least under the law – the Town does not endorse it; that this is a private display by Mrs. Donnell. You could do that, but you have to take into consideration the historic use of that property and whether or not you wish to open it up for that use in the future. We would be happy to answer any questions you might have.

Brooks:

Thank you. Mr. Randolph, I was wondering if we shouldn't ask opposing counsel if they

would like to go first; then we will go to the Mayor and Town Council.

Mr. Critton, Mr. White you may be able to help us, specifically, as regards Mr. Randolph's statements on Allegheny and the establishment clause.

White:

My name is Edward White with the Thomas More Law Center.

We are just here today to offer our request that was offered in writing back in September as far as getting into any legal issues, to advise this panel, that is for Mr. Randolph, not for us. So, we respectfully decline to address any of the legal matters.

Brooks:

My question, sir, is that Mr. Randolph has already addressed them, and I believe you, as the plaintiff, should have the opportunity to either counter or agree with him. Your leaving us in a situation where we have heard from our counsel, and we want to be respectful and hear from the plaintiff's counsel.

White:

Right, and we will address those issues before the Federal Judge. That's where the legal issues should be addressed. Thank you, sir.

Brooks:

If you could please stay there, sir. Candidly, I found your answer inadequate, but let me go to Mayor Smith.

Smith:

Yes. Mr. White, you can tell me, we have two separate issues here today as Mr. Critton said and as you said now you are before the Federal Judge. That means the Town and the Town Council and myself will be continuing with the Federal law suit, not matter what action the Council takes here today, and I would like to state at this time that I understand the right and being a Catholic, I love the creche and the nativity, and I think that perhaps the Council should have addressed this issue at an earlier time. It was brought up at an earlier time, and I certainly agree with you on that, so you might call us a little bit lazy or not, but to call us religious bigots, I found offensive, and that was named in the law suit. I thought that went overboard.

White:

I am not aware of that – you being accused of being a religious bigot as stated in the pleadings.

Smith:

It was in the law suit. However, perhaps you could tell me, what would be – if the Council today decides to go ahead with the request from the two women to place – we would still be

continuing with the Federal law suit that I can't remember whether it was you or Mr. Critton who said it might go all the way to the Supreme Court?

White:

Right now before this panel is the Judge's mandatory injunction to give us an answer – yes or no – by noon tomorrow. Now, as far as what happens with the law suit after that, I can discuss that with Mr. Randolph at a later time.

Brooks:

This is government in the sunshine, sir, feel free to discuss it right in the open now.

Smith:

Yes. Please tell us.

White:

I will discuss that with Mr. Randolph. This is not the proper forum. I respectfully understand your position, Mr. Brooks, but my position is that legal matters will be discussed in a court of law. This is for a public hearing on these two ladies' request that was made as far back as September, but has not been ruled upon or even considered by this panel until this morning.

That is all I have to say on that point. I say that with all due respect, sir and ma'am.

Smith:

I just don't understand why you can't tell us what would be the continuation of the Federal law suit.

White:

Again, it – we would like to hear your decision first. That is what is on the table right now, and then we will proceed in the proper order. Right now it is to get a decision – yes or no – from this panel, and then the law suit is the second step because we have to go back to the Federal Judge with your answer.

Brooks:

Excuse me, Mr. White, you're the one who surfaced the Federal law suit long before we talked about a decision. Now you are reversing it. You are saying we will go with the decision, then we will talk about it. Not that we are afraid of a Federal law suit. I mean they are a dime a dozen, but you are the one who brought it up, not this panel.

White:

I don't understand your question.

Brooks:

No. It's not a question. It's a clarification. It's a statement. You are the one who brought

up the Federal law suit, not this panel, not our attorney.

White:

Okay. We're the ones who filed the Federal law suit. Why we are here today, and again I don't want to waste any more time here, is that we are here for this panel to consider our valid request and get an answer. Okay? Now, what happens after that is a wholly separate issue which is not before the panel right now and is not a relevant matter. On the agenda is the consideration of our request. That's it. I don't see anything else on this agenda that....

Brooks:

That is correct, sir. I asked, as a gentleman, to see if you could help this panel by addressing the Allegheny case and its references to both the Christmas tree and the menorah and the establishment clause which we, as sworn officials, must uphold the law. You, now, are choosing to ignore that and simply say 'make a decision and maybe we will see you in court later' if I am reading you correctly.

White:

No. What I am saying is the legal advice to this panel comes from your legal counsel, not from me. Okay? And, ...

Brooks:

I didn't ask for your legal advice, Mr. White. Let me try again. I asked if you wished to respond to our legal counsel who talked about Allegheny and the establishment clause. I'm trying to be very, very clear and plain in my statement.

White:

Right, and, sir, I said about 5 minutes ago that I respectfully decline to address that point.

Brooks:

Thank you very much, sir.

Okay, Mr. Randolph, anything you would like to say?

Randolph:

No. I would like to ask Mr. Dusey a question for the record, though.

Mr. Dusey, would you state your name for the record.

Dusey:

For the record, Al Dusey, Public Works Director.

Randolph:

And what are your duties as Public Works Director for the Town?

Dusey:

Well, if I started now, I may not finish by tonight. We don't have enough time.

Randolph:

We don't have time for that. Is one of your duties to oversee the public rights-of-way?

Dusey:

Yes, sir.

Randolph:

Is the median on Royal Poinciana Way a right-of-way over which the Town has jurisdiction?

Dusey:

It's owned by the Florida Department of Transportation. We have maintained that – a portion of the right-of-way since I have been here – 18 years.

Randolph:

And the determination of what goes into the right-of-way or into the median is with the DOT?

Dusey:

The DOT would have ultimate responsibility for – something that would be unusual. They have allowed us to maintain it, plant flowers, and all those kinds of things without permits.

Randolph:

All right. Thank you. I have no further questions.

Brooks:

Thank you. Gentlemen, anyone have any questions for Mr. Randolph? Mr. McLendon.

McLendon:

Yes, I would like to ask Mr. Critton a question if I may. I did ask you about the size of the smaller unit. You mentioned the other one was life size.

Critton:

Yes.

McLendon:

What area–how much area or square footage would the large size figures occupy?

Critton:

While I would like to be able to give you a 100% clear answer but I can't, Councilman. Larger than a bread box, smaller than a garage. There are a number of life size figures, and I would

say the 36 inch one is probably, if you probably spread it out, it would probably be about yea far. Yea far doesn't go on your record, but I would say 6 to 8 feet.

McLendon:

In a line? Like figures in line?

Critton:

Yes. The goal here is not to take up 40,000 square feet of space by putting a figure in each of the locations. The whole design of a nativity creche is to put it together, because of its – that's the way it was. So, the idea is not to spread it out.

McLendon:

How many figures? Four or five?

Critton:

I believe so.

Brooks:

Mr. Goldblum.

Goldblum:

Mr. Randolph. We could not consider these two locations together as I understand it. One is on private property and would have to have permission. We can't make the decision on private property without that owner knowing what we're doing.

Randolph:

Well, in regard to that particular location, the Town received permission from the private property owner to place the menorah last year. So, presumably you would have to receive the permission of the private property owner to place the nativity scene. I really think that location is one that you should re-examine next year, because I don't think that is as clear cut a case as...

Goldblum:

Well, if the owner agrees to allow on his private property and it is put there by the owners of the nativity scene, that would be allowed. Am I correct?

Randolph:

Be allowed, and I think it would be a strong case for the Town if the menorah was also put up by the private property owner rather than by the Town in the future.

Goldblum:

Thinking back, the Worth Avenue Association was the one that wanted the menorah there, because this season is a buying season for both, for all, religious groups, and that was the reason of the establishment law of putting it there.

Smith:

Maybe they have already checked. Mr. Critton, have you already checked with Mr. Goodman, the owner of the Esplanade, to see if he would accept the nativity scene?

Critton:

No request was made directly of Mr. Goodman. That again, the request, we received as –and I don't want to recreate the history here – but the request came in September and October and we received basically less than – 1 o'clock yesterday – 16, 17 hours to appear here today to finally consider this particular issue.

Smith:

No. I didn't know if you may have talked to him prior to that time.

Critton:

We did not. If I may make one other comment, President Brooks. Councilman McLendon in reviewing the record when Councilman Goldblum made the recommendation in regard to the two menorahs, there was never a discussion with regard to - that's reflected in either in the memorandum or in the public record that reflects dimensions, size, or any issues associated with it. It was simply put forward, and it was approved, and I think that is what the record will reflect, sir. So, to the extent that you are asking me now about size, dimensions, number of figures, I would respectfully suggest that may well have been an appropriate discussion, had it occurred back in September or October. I think it puts us at a distinct disadvantage here, today, to now put dimension, size, control issues that never existed with regard to the menorah. I only bring that out, because I don't want a different standard being applied to our creches that the issue was never even raised at the time.

Randolph:

If I may, the....

Brooks:

Thank you for your observation. Mr. Goldblum, could you wait until I call on you please. Mr. Randolph, do you want..

Randolph:

The record may not have indicated that, but I believe that the Town Council had knowledge of the size of the menorahs that were going to be given at that time.

Smith:

I think we did, but I think Mr. McLendon wasn't trying to put controls on the size. We all know what a creche looks like. We all know what the animals and the kings– we all know that. I think he was just trying to get an idea if you were putting anything extra in, maybe like live donkeys.

Randolph:

Quite frankly, Mr. Brooks – I'm sorry to keep interrupting, but it is a legitimate question

when considering time, place, and manner of restrictions.

Brooks:

Mr. Goldblum.

Goldblum:

Mr. Critton, you're right in what you are saying except one thing, we, Mr. Evans who donated the menorahs got pictures of commercial menorahs and the sizes that they were which I am sure the nativity scene has dimensions on it, but I don't think that is relevant at this present time. But we did know what size the menorahs were going to be before we ordered them in fact.

Critton:

Thank you, sir. And again, the public record doesn't reflect that, and had we got the opportunity to have this considered, we also would have taken the same approach. Thank you, sir.

Brooks:

That's a very fair observation, Mr. Critton. Thank you. Okay. Anyone else for Mr. Randolph? Mr. Critton or Mr. White would you care to address the Council? Seeing that you do not, I then will open this up for public comment.

C. Comments from the Public

I would ask please that you come to the microphone; that you give your name; that you limit your remarks to 2 minutes or as close to that as possible; and subsequent speakers, if you could try to avoid being repetitive, the Mayor and Council would be most appreciative.

Ma'am, I think you had your hand up first. Please come to the microphone, give your name, etc.

Smith:

And there are microphones on each side. There is one over here too.

Brooks:

If the next speaker wants to queue up over here, that will be fine.

Corbin:

I am Jan Corbin, and I thought it was really interesting that a menorah can be a secular as well as a religious symbol, and I respectfully submit that the creche, although it is religious to Christians, is an historical symbol. Christmas is a national holiday, and it is not a Druid feast of trees where a tree symbolizes it. It is the birth of Christ, and Christ was a philosopher, and the manger has been called the cradle of democracy, because Christ was a revolutionary philosopher in our country. Definitely, takes our belief that all men are created equal from him; therefore, it is an historical as well as a religious scene, and I am appalled that there are groups trying to write this out

of schools and public places when our country has a lot of interest in this history. So, I hold, and I don't know why the courts don't hold that this is an historic event that basically changed a lot of the world, and can't we look at it as a historical event as well as a religious event and treat it like the menorah – both religious when it is in religious context and historical context when it is shown as a piece of American or western history. I don't understand why we can look at one religious symbol two ways, but we can't look at another.

Brooks:

Again, I would ask that if you wish to speak, we have two microphones, so the next speaker can queue up there and someone can queue up over here. That would kind of move it along.

Ma'am please go ahead. Please identify yourself.

Lembo:

Your Honor and Town Council, my name is Carole Lembo, and I am an ordinary citizen, and I think that I speak for those of us who love this Town of Palm Beach and are disappointed in the fact that we are embroiled in this controversy. I would imagine all of us are.

I just simply would like to say that as I see it, the Christmas tree is a secular tree. The menorah and the creche are religious symbols. So, we have the secular symbol and religious symbol. I think that we have worked or the Town has worked so hard to have fellowship with all religions, and it seems to me that it would be such a privilege for the Town Council to at this particular time of year to help all of us, we citizens, to move us from the external realities to the internal one, and to move us from the secular to the sacred for just this one time of year. I think that all of us would be so proud of our Town Council.

Brooks:

I'll try again– if the next speaker would like to queue up, please do so. Yes, ma'am.

Moran-Bushar:

Good morning. My name is Rachel Moran-Bushar, and I would just like to make a couple of comments please. First, I hope that our Council that we have elected now understands that you have to address your citizens' issues. Unfortunately, Madam Mayor, the reason this has become a national awareness is because – unfortunately, I think we are now going to be the next topic of Frank Cerabino's book relating – because this has been handled like a lousy condo board that will not listen to their people. I don't mean to be flippant, but this is not the way that any type of business should be conducted. People have the right to make a comment whether they own a condo, whether they live in a town or anything, so I hope that we have all learned something and move forward with that.

The second thing I 'd like to just make in regarding the menorah being a secular issue – a secular item. From the site that I download from the internet, it is referred to as a religious item and representative of Judaism. What my concern is when we try to consider the menorah as a secular item and equate it with a secular Christmas tree, one of the saddest things I've always seen is the left

over discarded Christmas trees, thrown to the curb, to be picked up by garbage trucks and disposed of and mulched. So, in that case, are we saying that these menorahs that are displayed as secular items are to be thrown to the curb and thrown into garbage trucks? To me, that would be saying that these items since they were considered secular are no different from a Christmas tree that can be disposed of as garbage, and I find that offensive, because I recognize the menorah as a religious item. So, I think we need to tread carefully when we start saying something is secular or religious, and I would find that desecration of a religious symbol.

And finally, just about the Bradley Park being a public forum. Unfortunately, anything that you place in Bradley Park, it's only when you leave Palm Beach that you really get to see it. But, as you know, when you come over the bridge, that's when you see Palm Beach, and I think we have to sort of consider that also: Do we want this to be an after thought as we leave the Town? You look over there – you're too concerned anyway about the police being there getting you for radar – seeing anything there. I just would like us all to take this forward with those thoughts and to – inclusiveness and tolerance for everyone and to seriously question: What is the fear about displaying a nativity set? I would like the Council to address that – not now – but to really take that philosophically. What is the true fear in people expressing their religious beliefs? Thank you.

Brooks:

Thank you, ma'am.

Mr. Ambassador.

Coleman:

I'm Denis Coleman. I hadn't planned on saying anything. I'm also not a lawyer, and I must confess when I listen to all the lawyers talk, my eyes kind of gloss over and I get distracted, so I would just try to encourage you when you consider this to view it also in the light of common sense and symmetry. I think that common sense at some point has to take place along side the law -- the law it is supposed to be founded on. Thank you.

Brooks:

Thank you, Mr. Ambassador. Next, come up, please.

Barrett:

My name is Bob Barrett. I am a voter in this Town. I live in this Town, and our family has been here for almost 60 years. Like the prior speaker, Denis Coleman, I sort of feel that I would like to rise above the legal points and get to a town and a country.

I am a member of the Federation of Christians and Jews. I have worked in Israel. As a matter of fact, I worked for the Israeli government for a few years. I support the menorah. I am not here to argue. I am here to express my sadness. I think what is going on here today, what has happened, something has happened. It has become national. I'm local, but the issue is national. It is going to set back the efforts of the Federation of Christians and Jews here by 30 years. I ought to

know, I have been here all that time.

In the 1940's, my father and all the members from both sides of my family went to war, and one of the reasons we went to war was religious intolerance. I think that my father who died here in Palm Beach would be totally amazed to be in this room today. After his efforts and the efforts of not only the men but the women in our family who fought in Europe. They fought against religious intolerance. I'm not pointing a finger, but you know what they say in the Supreme Court – I can't define it, but I know it when I see it – well, I think I am staring it right in the face today. At least up to this point.

My approach in life has always been to try to find a solution, not point fingers, and I think your Council has intimated a solution so we don't become part of the national problem. That Palm Beach could actually be part of the solution for the first time in this country. As a business man of 31 years, admittedly in Wall Street. Don't hold it against me!

I would say the way we tried to solve issues like this was say, "Okay. What's the answer?" I think that is your question right now. I know I am almost out of time, but what I'm saying, you proposed one solution - make a statement and a sign saying we deny this or that, but you are capable, all of you, I'm looking right at you, to come up with a solution within the context of the law to solve this problem, and that is my plea to you, and my two minutes are up. Please, you can do it – solve this religious intolerance. Thank you very much.

Groth-Scada:

Good morning. My name is Winnie Groth-Scada. I did not plan on speaking today; however, I feel very strongly that I am speaking for myself; for all the young families. I have been a Town member for 45 years. I am now raising my three children here. I try to work on a lot of things, but this is one issue – when I left the house this morning, they said, 'Go, Mom!' They are very confused why we do not have a nativity scene in our Town. When I grew up here, there weren't a lot of young families, but now there are a lot of young families, and I just ask this Board on behalf of the children and the young families, and I request that they fairly represent religion of a lot of the new families who are here, young children who are growing up and being molded here. They were thrilled that I was going to be here, and I am sure that if there were other families who could be here and speak on their behalf, we deserve that nativity scene just as the rest of the religious areas have theirs. So, please on behalf of the rest of the families and the young children represent them.

Batallila:

My name is John Batallila. I met these ladies by phone only last week when I heard of their plight, and I came to their assistance. I represented, for a long time, a number of military retirees and disabled veterans organizations. We offered to help them put up the creche wherever they want it, and to stand vigil much as we do at the Wall of Vietnam Veterans in Washington. I feel very strongly that the Christmas tree, although a symbol of Christmas, is no more a symbol of the birth of Christ that the Easter bunny is a symbol of Passover. We feel very strongly, sir, that I think this august body should take into consideration and set an example for the rest of the country, because

all of us feel very strongly about it. Thank you very much.

Brooks:

Thank you, sir. Mrs. Victor.

Victor:

Thank you, Mr. Brooks. Wendy Victor. I'm not sure that I am hearing really the whole truth, and that there is full disclosure in the original presentation. I heard that there were two nativity scenes. But I gather that there is at least one more that Bethesda-by-the-Sea is being rather aggressively offered a nativity scene to display, and I wonder how many more are going on around Town? I've also heard from several sources that there are many, many law suits by the Thomas More Foundation across the country, and that we are not alone. And I would just like full disclosure.

The Mayor often jokes that she wishes the people would turn out for these Council hearings. The only time I can remember this many people in the room before was over the feral cat issue. I might say there are quite a few people that I see here today who only come out on the feral cat issue. In fact, they were here for the October, 2002, meeting when you discussed both these things together.

I'm afraid we are going toward a lose/lose situation. I feel – I am a Christian. I am a member of Bethesda - by - the - Sea. I'm a member of the Bath & Tennis club so I guess that makes me about as Waspy as you can get, but I have a lot of Jewish friends in the community, and I work with them, and I care for them, and when I was told last week that they really like seeing the menorah up, that means something to me.

I spoke with Les Evans before the meeting, and I said, "Les, would you be willing to remove the menorah from Royal Poinciana Place if we, the Christians, took away the holiday tree, and for this year, anyway, locate the two of them in Bradley Park and just left up our holiday tree on Worth Avenue?" He said he was willing to do whatever you wanted to do. My goal is that we stick together as a community and be honest with each other and tolerant.

Brooks:

Thank you, Mrs. Victor.

Cushing:

My name is Dee Cushing. I have lived here for about 22 years now, and on the point about common sense. We Christians are celebrating the birth of Jesus Christ, not celebrating decorating a Christmas tree. Why are people trying to take Jesus Christ out of Christmas? The whole word 'Christmas' means the mass of Christ. I think we have a right, a religious right, and a first amendment right to keep 'Christ' in Christmas.

Johnston:

I am Ernie Johnston. I just want to comment that it seems to me listening to this that everybody is concerned about the legal angle or side. As a fourth generation Washingtonian, now

a Florida resident, I am familiar with our government seat in Washington, D. C. Let me assure you that they are correct in their decisions. 99% of the time, they are wrong. In any event, I don't think you should worry about them. I think we should do just what a lot of these people before me have said make a decision upon what this Town needs. Thank you.

Brooks:

Thank you, sir. Yes, sir. Please.

Evans:

Good morning. My name is Leslie Evans. I come here with a very sad heart about this whole situation. When the menorahs were proposed, it was proposed basically– it was not to be something to put in your face. It was not something to divide the community. I'm a resident here. I'm proud of this community. This community, unfortunately, in the past had a reputation, whether it was valid or invalid, of intolerance, and I was proud – and I am proud – that there is such a degree of tolerance that the community has embraced. We did not seek and by 'we' it wasn't a coordinated group from all of the Jewish population. I certainly do not represent them, but there was no attempt to put a Christmas tree over here behind City Hall. There was no attempt to try to be one upmanship size wise – it was meant rather, not as religious symbol, but as a symbol of the Town's tolerance. That the Town would be – that the people could see that the past is the past and we have moved to a higher plane where we could be inclusive and could be acceptable – acceptance of all religions, and I am saddened to see that, unfortunately, I believe this has taken on tones which I am not thrilled with and which I think beget the real spirit of this season for whatever religion a person is involved with.

I would hope that the Town could find a place in a public location, possibly Bradley Park, for a nativity scene. I certainly do not want to cause any aggravation. It is not my goal, but I will say just one quick story, and I realize my 2 minutes are up. My Father-in-law happens to be a survivor of Europe. He lost his whole family there. Last year, when I said, because he questioned when we moved to Palm Beach because he had heard things about it being intolerant. Last year, I was very proud to say, 'Dad, you know basically we have a symbol up. We have a symbol of acceptance in the community.' My wife flew out to California this year to bring him back. He is 88 years old, and for him to see what he perceives is going on here is very sad. I hope the community can mend together. I hope we can work together and be tolerant, and I believe, no matter what people say here, and I am a lawyer, and I do believe, and you realize that you have to follow the law and I respect your decision. Thank you.

Brooks:

Thank you, Mr. Evans. Mrs. McFarlane.

McFarlane-Ross:

Cathleen McFarlane - Ross. When Charles Bane, Jr. started the Fellowship of Christians and Jews, he called me and said, 'Cathleen, will you be the first member, because if you are the first member, I think a lot of other people will be.' I was very, very happy to be that first member. I'm

not very active in it now because of other circumstances; however, I think this is such an important thing, that we have equal billing for Catholics or Christians I should say and Jews who want the menorah. I want the menorah too, but I also want the creche, and I want it to have equal space in this Town. Thank you.

Brooks:

Thank you, Mrs. McFarlane. Is there any other member of the public who would like to address the Mayor and the Council?

Seeing none, then I will continue. Mr. Randolph?

Randolph:

I just want to correct the record, because who knows who on the Supreme Court may be reading my statements. Sandra Day O'Connor did not make the statements that I attributed to her. In fact, that was Justice Blackman, but she said as follows: " Moreover the menorah is the central religious symbol and ritual object of that religious holiday. Under Justice Blackman's view, however, the menorah has been relegated to the role of a neutral harbinger of the holiday season. In my view, the relevant question for establishment clause purposes is whether the City of Pittsburgh's display of a menorah, a religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own belief. One may not characterize Hanukkah as a secular holiday or strain to argue that the menorah has a secular dimension in order to conclude that the City of Pittsburgh's combined display does not convey a message of endorsement of Judaism or religion in general." I felt it important to clarify the record, because she said exactly the opposite of what I said she said.

Brooks:

Yes. Thank you, Mr. Randolph. It is always good to correct the record, and I appreciate your candor in doing so. Mr. Goldblum.

Goldblum:

I heard some very compelling discussions, and I also believe in compromise. I served 4 years in the Armed Forces during the Second World War. I respect everybody's religion. I appreciate what you all say about the menorah, and I also respect the creche. I have heard some discussion that if it appeared in a public place, not by Jews, but by Christians that it would diminish the value and it would be disrespectful. I don't know. I am not Gentile. I am Jewish. I also heard from Mr. Randolph that if we made the Royal Poinciana Way a public forum with restrictions, we could do this. Is that right or wrong?

Randolph:

Yes. I believe that if it was a traditional public forum or if you designated it as a public forum, you could allow people to express their first amendment rights at that location under appropriate time, place, and manner restrictions, and with the disclaimer that it is not an endorsement

by the Town.

Goldblum:

All right. But we could hold it just for holiday functions. Is that right?

Randolph:

I don't know that. I think you could perhaps designate it for holiday functions. I don't know how well that would hold up under scrutiny of the courts for other people who want to display their religious.....

Goldblum:

Well, we can put up with another law suit if we have it.

Randolph:

There's always a possibility as Justice Scalia has said that the Courts haven't given very good direction on these things, and anything you do is going to be subject to scrutiny by the Courts. It is going to be looked at in context. If you were to allow this display at that location, you would simply have to know that by doing so, you may be allowing other displays of religious symbols or other symbols which may not be religious, but which may emphasize some other strongly held belief. That would become an area where you would allow it.

There's an argument to be made that if you don't declare it a traditional public forum but a designated public forum for holiday displays, that it could be looked at in that limited sense, but I don't know how the Court would look at it in the future.

Goldblum:

Maybe our great lawyers have an answer to that.

Brooks:

Norman, they are on record saying they wish not to address those issues. Mr. White said that he is here simply for the hearing that we were ordered by Judge Hurley to conduct.

Goldblum:

I would like to find some way to go forward with this and might be an answer and I'm willing to gamble another law suit if somebody else wants to come in and use it other than for traditional holidays.

Brooks:

Mr. Wyett, please.

Wyett:

The location on Royal Poinciana on the median which is basically a 'u' turn area, presents a problem. Nothing to do with religion. Nothing to do with any preferences. It is a public safety

as far as I am concerned. It's not the proper place for future demonstrations that are legal under the Constitution. If we so designate that location as a public forum, any group can come here at any time and use it. They could use it for a rally. They could use it for a large demonstration. The Muslims could come in and demonstrate the entire month of Ramadan. Other groups may have other times of the year, so it is not – mention the word 'holiday', it's not the Christmas holiday, it's holidays throughout the year, and then it could be expanded further.

We are fortunate in Town to have an adequate park pretty close to that location that we have referred to as the public forum, and it has been used in many religious ways. Maybe we need to enhance the park to make it even more acceptable. I have difficulty with Royal Poinciana Way from the public safety point of view and from no other point of view. I very much respect the request to demonstrate and have significance to having the creche, the nativity scene.

I was most moved by being at the original nativity scene in Bethlehem when I saw a young Japanese boy crawl in the very narrow space to kiss the star that had been placed at what was believed to be the original nativity. I think you have a right to have a nativity scene. I do not wish to deny it, and I apologize in one respect. The Town Council should have reviewed in a public manner and in a timely way, either in September, October, or November. We didn't do it out of meanness. We just thought we had answered the situation by allocating the space at Bradley Park. We obviously were wrong in the eyes of the Court, and therefore we are wrong in that respect, and we are here today to correct it, but we need your help and understanding that we have greater issues to look at than just one scene or one menorah or many scenes, and that is a problem. I'm not smart enough to have a solution to it. It will probably take Solomon. Thank you.

Brooks:

Thank you, Mr. Wyett.

Mr. Randolph, as you said about an hour and twenty minutes ago, the despositive case that we have before us is Allegheny and I'm wondering now, we've heard very sincere, good people express themselves for the law. We've heard very good, sincere people say, 'Well, the law's the law, but just use common sense.' I'm wondering if maybe we could reflect, those of us here know it, and the good people in the audience — let me begin by saying that transcendentally the story of Bethlehem is meant to give light and abundance of hope. Tragically, we once again see it enmeshed in a maze of legal controversies – why we are here today.

Nevertheless, those of us who have taken the oath of office and sworn to uphold the law, whether we agree or disagree with the law is totally irrelevant. Speaking personally, as a Catholic, I would love to see a nativity scene; however, my oath of office and my respect for the law, specifically the establishment clause, precedes and supercedes my own personal preference. So, that's where we are at, and I would hope that at this time of the year, we wouldn't end up in vitriolic name calling and shaking of fists or questioning one's religious strength or identity or lack of same. That we are all citizens of the United States of America, and the beauty that we have in our country in my judgement is that we do not have an established religion. That we are free to worship or not

to worship as we see fit. If we look at Spain, France, and Italy, which were under a very serious regime of Roman Catholicism; if we look at England and Scotland to a lesser degree; Ireland, where the British Crown enforced an official religion; if we look at the north countries, where Lutheranism, in Norway, Sweden, and Denmark rule, I think it gives us all the opportunity to pause and thank God that we are Americans, and that while we may have disagreements, and while we may wish such and such could be and such and such could not be, the point is, we live under a rule of law, and it is incumbent upon the Mayor and this Council to make a decision as best they can, understanding the law and following the law. To that end, I would ask Mr. Randolph now – it's been a while since you gave us the steps that we must follow, and I would appreciate it, for my benefit and the benefit of the Mayor and the Council, that you go over – I believe that we have identified two – and the second may have two parts to it – but if you could try, please.

Randolph:

Thank you. The first issue for your consideration is the issue of the establishment clause, and based upon the understanding, that at least I had, of the initial request, that the Town put up a nativity scene with taxpayer dollars at these particular locations. I think your decision is whether or not you are going to accept that request. That would be decided under the establishment clause, and under the principles announced by the Supreme Court in the Allegheny Case. I think that's the first decision for you to make.

I think the next decision for you to make is in regard to Mrs. Donnell's, and anyone's, rights of freedom of expression. And, in that particular case, you should make a determination as to whether or not there are time, place and manner restrictions that are acceptable to you to allow the nativity scene to be placed. The determination there is whether or not it is placed in a traditional public forum, or in a designated public forum.

I think you should break the two issues down in that way and perhaps deal with the establishment clause first.

Smith:

Mr. Randolph, why does the Council have to deal with the establishment clause first, when we have heard that Mrs. Donnell would be underwriting the costs. Why would we have to put the Council in the position of voting yes or no on using taxpayers dollars for the establishment of the creche?

Randolph:

Well, you may be right.

Smith:

I would think that the issue really facing the Council now would be a question of whether or

not they would accept Mrs. Donnell's donation of the creche to the Town, and whether or not, if they did, where would they place it. I have heard people speak about common sense, yet they didn't tell us from their common sense point of view exactly what they would do. The other part of it is, I've heard people say that we should compromise. I don't think that the Council is looking for a compromise, because they have not taken any action. As I said, you can accuse us of being lazy, but not of being intolerant. So, this would be my thoughts, and that is what I would like you to respond to, please.

Randolph:

The issue related to the establishment clause of course – and I know we are not here to discuss the lawsuit – but the plaintiffs have contended that the Town is endorsing a particular religion by having placed the menorah. I think you need to make a determination as to whether or not you are comfortable with the fact that you have not endorsed a particular religion by having done that. Then, the request initially was for the Town to place it. If the request has been amended today to not request that of the Town, then perhaps you don't have to deal with that issue. If the request has been amended to allow Mrs. Donnell to place it, then perhaps it's appropriate for you just to deal with that particular question. But, I interpreted the first request that the Town place it, and I have an idea that the plaintiffs want to make a point of that in their lawsuit.

Smith:

Well, I'm not talking about the lawsuit, because Mr. Wyett made a point that we can't talk about the lawsuit. If they want to continue with the lawsuit, that's certainly up to them, and certainly then we will be using taxpayer dollars to defend the lawsuit brought by the plaintiffs. We're talking about the creche. I also feel that, from everything that we've said here today, I don't think anybody sitting out in the audience believes that the Town Council sitting here is endorsing one or another of the particular religions because of what was done in 2002. We're talking about the placement of a creche, not about the Town Council supporting a menorah against the creche. I don't think that's the point here today, and I think that is very important. I'm sorry that we didn't get more information on the lawsuit, because as one of the speakers said, Frank Cerabino's column – we're able to be fodder for Frank Cerabino's column no matter what we do. We've done it for the past couple of years, and actually, he's a pretty good guy, and we laugh about it every now and then – mostly then. But, you know, this is not something that I feel is something that's humorous. It's something that is very important for all of the people of the Town. We are not just a Town, we are a community living together, and we have been working very, very hard to eliminate any degree of intolerance in the Town, particularly through the fellowship now headed by Jack Thompson. So, I feel it is divisive to have this type of conversation two days before Christmas, but we didn't bring it up two days before Christmas – the timing was not of our choice. It's something though, that I feel is important – we live together, we work together, and we pray together, whatever religion we have, and whatever decision is made here today, I hope that we will all leave wishing each other Merry Christmas and Happy Hannukah, and the best to all of you. Thank you very much.

Wyett:

Mr. Randolph, what would be the Town's position if the Town decided after this year, because it's too late now, to have the menorah at Bradley Park and not at the median, and not at Worth Avenue, leaving the Christmas trees to be secular and as a universal expression of the holiday year. What would be the position in allowing the creche to be then where the plaintiffs would like it to be, on the median?

Randolph:

Under the allegated case it would be considered an endorsement of religion, and contrary to the establishment clause if the Town was to allow the navitity scene to be placed in the median. When I say to allow it, I mean that if the Town was to put it up with taypayers dollars.

D. Deliberation by Mayor and Town Council

Councilman McDonald:

Thank you, Mr. Brooks. I am going to move that the Council approve the Special Event Permit of the applicants to display the nativity creche in Bradley Park at their expense, subject to the applicable conditions and disclaimers that are required by anyone else that makes a display in Bradley Park.

Councilman Wyett:

Second.

President Brooks:

We have a motion, and we have a second.

Is there any discussion from the Mayor or amongst the Council members?

Hearing none, I will call the question. Mrs. Pollitt, please, we have a first and a second.

Roll call:

McDonald: yes

Wyett: yes

McLendon: yes

Goldblum: yes

Brooks: yes

Mr. McDonald's motion passes 5 to nothing to allow Mrs. Donnell to erect the nativity scene in Bradley Park.

Is there any other matter before the Council today, Mr. Randolph?

Have we covered the base that you needed as regards the Mayor's question on the establishment clause?

Attorney Randolph:
I believe you have by your action.

President Brooks:
Thank you, sir.

V. Adjournment

President Brooks:
I'll entertain a motion to adjourn.

Mr. Goldblum:
So move

Mr. McLendon:
Second

Town Clerk Pollitt called roll and motion to adjourn carried unanimously.

President Brooks:
Thank you ladies and gentlemen. Merry Christmas and Happy Hannukah.

William J. Brooks
Town Council President

Mary A. Pollitt
Town Clerk